No. 87-1661 (11)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ASARCO INCORPORATED, CAN-AM CORPORATION, MAGMA COPPER COMPANY, and JAMES P.L. SULLIVAN,
Petitioners,

v.

FRANK and LORAIN KADISH, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Arizona

BRIEF FOR PETITIONERS

HOWARD A. TWITTY
Twitty, Sievwright & Mills
2702 North Third Street
Phoenix, Arizona 85004
(602) 248-9424

DANIEL M. GRIBBON *
WILLIAM H. ALLEN
ELIZABETH V. FOOTE
DOUGLAS R. WILLIAMS
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

BURTON M. APKER
Apker, Apker & Kurtz, P.C.
Park One
2111 East Highland Avenue
Phoenix, Arizona 85016
(602) 381-0084

Attorneys for Petitioners

* Counsel of Record

November 23, 1988

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QUESTION PRESENTED

The initial grant of federal lands to Arizona in the New Mexico-Arizona Enabling Act of 1910, which excludes mineral lands, requires that, prior to sale or long-term lease, granted lands first be appraised and then disposed of at no less than appraised value. The Jones Act of 1927, which grants mineral lands to some thirteen western states including Arizona, prohibits sale of such lands but authorizes the lease of mineral deposits "by the State as the State legislature may direct." Subsequent amendments to the 1910 Act similarly authorize the Arizona Legislature to determine the manner in which lands containing later-discovered minerals, which were held by this Court to pass to the state under the 1910 Act, may be leased for mineral purposes. Since 1941, an Arizona statute has authorized the leasing of all state lands for mineral purposes, including those granted to the state by the federal government, in return for payment of a uniform royalty of five percent. The question presented is whether, as the Arizona Supreme Court has held, the Arizona statute is invalid because it does not include the appraisal requirements imposed by the 1910 Enabling Act.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Arizona were Frank and Lorain Kadish, Marion L. Pickens, and the Arizona Education Association, plaintiff-appellants; the Arizona State Land Department, an agency of the State of Arizona, Joe T. Fallini, in his capacity as the State Land Commissioner (since succeeded by M. Jean Hassell), and Cyprus Pima Mining Company, on behalf of itself and others similarly situated, defendant-appellees; ASARCO Incorporated, Magma Copper Company, James P.L. Sullivan, Eisenhower Mining Company, Can-Am Corporation, intervenor-appellees; and the New Mexico Commissioner of Public Lands, amicus curiae.

The petitioners are ASARCO Incorporated, Can-Am Corporation, Magma Copper Company, and James P.L. Sullivan.*

* The listings for ASARCO Incorporated and Can-Am Corporation required by Rule 28.1 of the Rules of this Court are at page ii of the Petition for Certiorari, filed on April 8, 1988.

The subsidiaries of Magma Copper Company, except wholly owned subsidiaries, are San Manuel Arizona Railroad Company and Magma Arizona Railway Company. Magma Copper Company is approximately fifteen percent owned by Newmont Mining Corp. and approximately seventeen percent owned by Gold Fields American Corp., each of which has numerous subsidiaries and affiliates that this petitioner has not undertaken to list.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of Arizona (Pet. 1a-36a) is reported at 747 P.2d 1183. The opinion of the trial court, the Superior Court of Maricopa County (Pet. 37a-39a), is unreported.

JURISDICTION

The final judgment of the Supreme Court of Arizona was entered on December 10, 1987. (Pet. 1a.) Respondents' timely motion for reconsideration of their claim for attorney's fees against the state defendants was denied on February 2, 1988. (Pet. 44a.) On February 25, 1988, Justice O'Connor granted petitioners' protective application for an extension of time, to and including April 8, 1988, within which to file the petition. The petition was filed on April 8, 1988, and was granted on October 11, 1988. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

STATUTES INVOLVED

The relevant statutes are the Jones Act of 1927, Pub. L. No. 570, ch. 57, § 1, 44 Stat. 1026, codified as amended at 43 U.S.C. § 870; the New Mexico-Arizona Enabling Act of 1910, as amended, Pub. L. No. 219, ch. 310, §§ 24, 28, 36 Stat. 557, 572, 574; Act of June 5, 1936, ch. 517, 49 Stat. 1477; Act of June 2, 1951, ch. 120, 65 Stat. 51; and Ariz. Rev. Stat. Ann. § 27-234(B) (1976 and Supp. 1987). They are reproduced in the Statutory Appendix to this brief.

STATEMENT

Introduction. For almost fifty years, in reliance on the Jones Act of 1927 and cognate amendments of the New Mexico-Arizona Enabling Act of 1910, which respectively authorize the lease of mineral deposits "by the State as the State legislature may direct" and "in such manner as the Legislature of the State of Arizona may prescribe," Arizona has by statute leased its lands for mineral purposes, charging a uniform five percent royalty on the net value of the minerals extracted. Respondents challenge the state royalty statute because it requires neither an appraisal of each area before it is offered for mining nor leasing of mineral deposits for not less than the value so ascertained. They claim that these requirements, which are imposed by the original Enabling Act, govern mineral leases both in the lands granted to the state by the Jones Act and in lands containing later-discovered minerals that were held by this Court to pass to the state under the Enabling Act of 1910.

Federal School Land Grants. Two federal statutes grant substantial acreage of public land to Arizona: the New Mexico-Arizona Enabling Act of 1910, which authorized the Territory of Arizona to form a state government and join the Union, and the Jones Act of 1927, which expressly grants to Arizona mineral lands that had

been excluded from the earlier grant.[1] Both federal grants require the state to use any proceeds the state derives from those lands for the support of the state's public schools.[2] There is no dispute in this case that the proceeds have been so used.

The grant to Arizona in 1910 was for the same purpose as grants of land Congress had made to other western states. Since the passage of the Northwest Ordinance of 1789, ch. 8, 1 Stat. 50, it has been the practice of Congress to grant a portion of land within the borders of a newly entering state for the state to use in support of its public schools. In addition to promoting education, the purpose of those federal school land grants was to put the public land states on an equal footing with the original thirteen states, which owned their lands outright, and to increase the state's tax base, as federal property is not taxable by a state.[3]

Separate, virtually identical sections of the New Mexico-Arizona Enabling Act of 1910 deal with lands granted to New Mexico and Arizona, respectively. By Section 24 of the act, 36 Stat. 557, 572, Congress granted to Arizona four numbered sections of land in each township for the new state to use for the education of school children—a total of some 8 million acres.[4] In accordance with the practice Congress observed in other school land grants, the 1910 grant to Arizona and New Mexico did not include mineral lands. It provided that, if a num-

[1] New Mexico-Arizona Enabling Act of 1910, Pub. L. No. 219, ch. 310, 36 Stat. 557; Jones Act of 1927, Pub. L. No. 570, ch. 57, § 1, 44 Stat. 1026-27 (codified as amended at 43 U.S.C. § 870).

[2] 36 Stat. 557, 574; 44 Stat. 1026-27.

[3] *See* Gates, *History of Public Land Law Development* 285-318 (1968); Papasan v. Allain, 478 U.S. 265, 269 n.4 (1986); Andrus v. Utah, 446 U.S. 500, 522-23 (1980) (Powell, J., dissenting).

[4] In addition to confirming the previous grant of sections 16 and 36 to the Territory of Arizona, the Enabling Act granted to Arizona upon statehood sections 2 and 32 in every township. § 24, 36 Stat. 572. Sections 6 and 10 of the act govern school land grants to New Mexico. 36 Stat. 561, 563.

bered section named in the grant was mineral in character, then the states had the right to select in lieu thereof other, nonmineral lands from the public domain.[5] (P. 3a, below.)

The grants to Arizona and New Mexico differed in an important respect from the earlier grants to other western states. Because some of the states admitted to the Union before Arizona had permitted the proceeds from the sale of school lands to be wasted or diverted to other uses, Congress in the Enabling Act of 1910 imposed detailed restrictions on the manner in which Arizona (and New Mexico) could dispose of the lands granted to them by that act. *See* H.R. Rep. No. 152, 61st Cong., 2d Sess. 3 (1910); 45 Cong. Rec. 8227 (1910) (remarks of Sen. Beveridge). Section 28 of the act prohibited Arizona from selling or leasing the granted lands except to the highest bidder at public auction after advertisement in a newspaper of general circulation. It required all "lands, leaseholds, timber, and other products of land" to be appraised to determine their true value "before being offered" for sale or lease and prohibited the state from selling or otherwise disposing of the granted tracts for less than the value so ascertained. As originally enacted, Section 28 also provided that "nothing herein contained shall prevent said proposed State from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required." 36 Stat. 574 (p. 9a, below).

Arizona accepted the terms of the Enabling Act and joined the Union in 1912 on an equal footing with the earlier states.[6] Its Constitution contains a rescript of Section 28 as required by Section 20 of the Enabling Act of 1910. *See* Ariz. Const. art. X, § 4; 36 Stat. 570-71.

[5] §§ 24, 29, 36 Stat. 572, 575. *See also* United States v. Sweet, 245 U.S. 563, 567-72 (1918).

[6] *See* Ariz. Const. art. XX, ¶ 12; S.J. Res. 57, 37 Stat. 39 (1911).

The exclusion of mineral lands from the public land grants to Arizona and other western states generated considerable confusion with respect to title to lands found to contain mineral deposits after the grant to a state of nonmineral school lands had become effective. This Court ultimately ruled that, if land identified as state school land in the granting act was not known to be mineral at the time the title passed to the state, the state's title was not defeated by a subsequent discovery of mineral deposits. *Wyoming* v. *United States*, 255 U.S. 489, 499-500 (1921).

Factual questions persisted about when minerals were discovered and gave rise to continuing disputes as to whether the federal government or a state or its grantee held title to lands found to contain mineral deposits. About a dozen western states were affected. These states strongly urged that they should enjoy the benefits of the minerals in granted lands just as the eastern states, which had sovereignty over all of the lands within their borders, enjoyed such benefits. Congress responded in 1927 by enacting the Jones Act. Ch. 57, 44 Stat. 1026 (p. 1a, below).

The Jones Act of 1927 was not an amendment of the New Mexico-Arizona Enabling Act of 1910 or any other state's enabling act. It granted to each of the school land grant states, including Arizona, the numbered school sections specified in the respective enabling acts that did not pass to the states because of their known mineral character. It prohibited the states from selling the mineral deposits on the newly granted lands but expressly stated that the mineral deposits "shall be subject to lease by the State as the State legislature may direct." It provided that "the proceeds of rentals and royalties" from the leases should be used in support of the state's public schools. 44 Stat. 1026-27.

In 1936 Congress again took action affecting Arizona's school lands by amending Section 28 of the Enabling Act of 1910. For the original proviso permitting five-year leasing of surface lands without advertisement, Congress

substituted a provision that "nothing herein contained shall prevent said State of Arizona from leasing in a manner as the State legislature may direct" any lands granted by the Enabling Act for grazing and agricultural purposes for up to ten years and for mineral purposes, for up to twenty years. Pub. L. No. 658, ch. 517, 49 Stat. 1477, 1478 (p. 10a, below). In 1951 Congress again amended the same proviso of Section 28 of the Enabling Act of 1910 and authorized the state legislature to lease lands for mineral purposes for up to twenty years "in such manner as [it] may prescribe" even if the lands might also be leased for grazing and agricultural purposes. This amendment also established a separate regime for oil and gas, which authorized the state to enter into leases of indefinite duration for those minerals, with or without advertising, bidding, or appraisement, and at a royalty rate of not less than twelve and one-half percent. Pub. L. No. 44, ch. 120, 65 Stat. 51, 52 (p. 5a, below).

Arizona's Mineral Leasing Program. Nearly all of the minerals mined in Arizona are metallic. Copper and its by-product molybdenum, along with silver and gold, account for ninety-five percent of the total mineral values in the state.[7] Exploration for and production of these ores and others like them typically require initial reconnaissance of the surface, detailed geological and geophysical surveying and exploratory drilling to locate hidden deposits. Once a deposit is located, pattern drilling and sometimes exploration shafts are needed to delineate the ore body and obtain samples for testing.[8] Because the metallic minerals indigenous to Arizona are commonly disseminated through volumes of barren rock, the development costs of extracting these ores exceed those asso-

[7] Department of the Interior, Bureau of Mines, *Minerals in the Economy of Arizona* 6 (1978).

[8] *See generally* Congress of the United States, Office of Technology Assessment, *Management of Fuel and Nonfuel Minerals in Federal Lands* 46-52 (1979).

ciated with the hydrocarbon minerals (oil, gas and coal) found in widespread pools and fields in other states.[9]

In 1941 the Arizona Legislature enacted the leasing regime that continues to govern all nonhydrocarbon mineral leases of state lands, including public school lands.[10] Any person who discovers a valuable mineral deposit on state land may locate the deposit as a mineral claim. Ariz. Rev. Stat. Ann. § 27-231(A). The locator will then be eligible to lease the mineral lands from the state if he performs discovery work or development drilling. *Id.* § 27-233. Alternatively, any person may apply for a mineral exploration permit to explore for minerals for a term of one year (renewable for up to five years) and the prospecting rights granted are exclusive. *Id.* §§ 27-251, 27-252(A). The locator of a mineral deposit is accorded a "preferred" right over others to secure a lease from the state that will entitle him to extract the ores, *id.* § 27-233(A), and a prospector operating under a state permit is granted an "exclusive" right to obtain such a lease, *id.* § 27-252(A)(1).

Payments to the state under mineral leases, which are for a term of twenty years, are set by the state statute at five percent of the net value of the minerals extracted, in addition to a nominal annual rental. *Id.* §§ 27-234 (A), (B), 27-235(A). The net value to which the royalty applies is the value of the minerals after deducting processing costs, transportation costs and taxes—that is, after deducting the costs the lessee incurs after the minerals reach the earth's surface. Exploration costs, development costs and mining costs may not be deducted. *Id.* § 27-234(B). Arizona has never required appraisal

[9] *See generally* 1 Rocky Mountain Mineral Law Foundation, *American Law of Mining* §§ 1.01-1.07 (2d ed. 1988).

[10] Act of March 24, 1941, ch. 78, 1941 Ariz. Sess. Laws 145, codified as amended at Ariz. Rev. Stat. Ann. §§ 27-231-37. Arizona's leasing of oil and gas is governed by a separate statutory regime not at issue in this case. *See* Ariz. Rev. Stat. Ann. §§ 27-551, *et seq.*

of the mineral lease areas or that lease payments reflect an appraised value. The state follows those procedures only when it sells or leases nonmineral state lands and surface assets. *Id.* §§ 37-231, 37-236-38, 37-481.

The state legislature's use of a royalty as the principal form of payment to Arizona for mineral extraction on state lands is not uncommon. Under the federal mining laws of 1872, which continue to govern exploration for most metallic minerals including those commonly mined in Arizona, a locator operating on federal lands makes no payments whatsoever to the United States for extracting the ores, after securing a patent at a nominal charge.[11] When other laws of the United States or the laws of the states do require a lessee to pay for the extraction of minerals from public lands, they typically require lump sum payments (often called bonuses) or royalties (or profit sharing) based either on the gross or net value of the minerals extracted.[12] Each method has advantages and disadvantages. A uniform or flat rate such as the royalty adopted by the Arizona Legislature for nonhydrocarbon leasing has three significant advantages: predictability for prospective investors, which encourages them to prospect and mine; reduced administrative costs; and revenues tied to the market value of the minerals extracted.[13]

Royalty payments to Arizona's school fund under the state mineral leases have resulted in significant financial benefits for the public schools. During the fiscal year

[11] 30 U.S.C. §§ 21-54. *See* p. 35, below.

[12] *See generally*, Office of Technology Assessment, *Management of Fuel and Nonfuel Minerals*, *supra* note 8, at 150 (federal laws).

[13] *Cf.* 30 U.S.C. §§ 272, 273 (flat five percent royalty for sulfur); 53 Fed. Reg. 28822 (1988) (proposing flat royalty rate on value of coal removed in part to eliminate the cost of individual analysis); Oregon Admin. Rules § 141-71-610 (1988) (flat five percent royalty for "metallics and uranium"); Utah Admin. Code § R632-20-10 (1988) (schedule of fixed royalties for various types of minerals); Washington Admin. Code § 332-16-270(2) (1977) (fixed royalty of three percent unless otherwise specified).

1986-87, a total of $4,196,252 in mineral rentals and royalties was paid to the State of Arizona by lessees of state mineral lands.[14] These revenues are in line with the revenues that other western states derive from leasing school lands that are mineral-bearing.[15]

Proceedings Below. Respondents are named taxpayers and the Arizona Education Association, representing its 20,000 members who are teachers in the Arizona public schools. They initiated this action in 1981 in the Superior Court of Maricopa County naming as defendants the Arizona State Land Department, the State Land Commissioner, and Cyprus Pima Mining Company on behalf of itself and others similarly situated. The complaint alleges that the taxpayer-plaintiffs pay property taxes that are used to support public education and that the Arizona statute governing mineral leases has "deprived the school trust funds of millions of dollars thereby resulting in unnecessarily higher taxes." (Complaint ¶ III, J.A. 1.) The 20,000 teacher members of the Association claimed that the challenged state statute has an adverse economic impact on them and that the state's failure to follow the Association's view of what federal law requires adversely affects the "quality of education in Arizona." (Complaint ¶ IV, J.A. 1.) (*See* Pet. 2a-3a.)

Plaintiffs allege that the Arizona statute authorizing a uniform royalty rate on minerals extracted from leased state lands is repugnant to Section 28 of the New Mexico-Arizona Enabling Act of 1910, as amended, and to article X, § 4, of the Arizona Constitution. They assert that, under Section 28 and the corresponding provision of the state constitution, each leased area must be

[14] Arizona State Land Department, 1986-87 *Annual Report* 34 (1987).

[15] Office of the Auditor General, *A Performance Audit of the Arizona State Land Dept.*, App. I (1980); Smith, *Elements of Mineral Leasing Systems for State Lands With Comments on the Laws of Selected States* (1980) (unpublished manuscript). (*See* J.A. 11, filing of Magma Copper Company on 1/31/86, App. IX, X.)

appraised before leasing to determine its true value and lease payments must be set at no less than that value.

Petitioners hold mineral leases on lands that were granted to Arizona by the Jones Act of 1927 and on lands that were held to pass to the state under the Enabling Act of 1910. Along with other mining companies and individual prospectors, they have invested heavily in exploring for and developing nonhydrocarbon ore bodies in the state. The trial court allowed petitioners to intervene as intervenor-defendants, and certified a defendant class of parties consisting of those holding or likely to hold mineral leases on lands the state received from the federal government.

The trial court, on cross motions for summary judgment, granted petitioners' motion. It ruled that the challenged Arizona leasing statute does not violate the New Mexico-Arizona Enabling Act, as amended, or its rescript in the Arizona Constitution. It determined that as a matter of federal law the state legislature had the power to enact the mineral leasing statute. On appeal the federal claim was appropriately preserved and the case was transferred from the court of appeals directly to the Supreme Court of Arizona because of the substantial importance of the issues presented. (Pet. 3a.) In a split decision that court reversed, holding that the Arizona leasing statute contravenes the requirements of the Enabling Act of 1910, as amended, which "forbid the state from making nonhydrocarbon mineral leases without appraisal or for less than their true value." (Pet. 24a.)

The Supreme Court of Arizona concluded that the provision in the Jones Act of 1927 that the grant of mineral sections "shall be of the same effect as prior grants" implicitly incorporated for mineral leases the Enabling Act's requirement of prior appraisal and leasing at true value. (Pet. 10a, 24a.) In addition, in the court's view, the "dramatic revisions" effected by the 1951 amendments to the Enabling Act "greatly reinforce[d]" that conclusion because they showed that Congress in 1951 did not

believe that the Jones Act of 1927 had passed mineral lands to the states free of the appraisal provisions that govern the disposition of lands granted by the state's enabling act. (Pet. 18a.) Finally, the court found language in this Court's decision in *Alamo Land & Cattle Co.* v. *Arizona*, 424 U.S. 295 (1976), which involved the lease of grazing land, "fully dispositive" of the issue presented in this case. (Pet. 22a.) The court declared the Arizona royalty statute "void" as repugnant to Section 28 of the 1910 Enabling Act, as amended, and its rescript in article 10 of the Arizona Constitution, and remanded the case to the trial court to enter judgment and determine the proper relief. (Pet. 27a, 29a.) On remand, the trial court declared the Arizona royalty statute invalid.[16]

Justice Cameron dissented on the ground that in both the Jones Act of 1927 and in the 1936 and 1951 amendments to the Enabling Act of 1910 Congress "in plain words" had authorized Arizona to lease state mineral lands in such a manner as its legislature might direct. The dissenting Justice noted that, "[b]ecause mineral lands were reserved to the federal government under the Enabling Act, Congress could not have contemplated their inclusion" in the restrictions on the state's leasing of nonmineral lands and surface assets in Section 28 of the Enabling Act of 1910. He further observed that subsequent legislative events showed that Congress affirmed the sole authority of the states over the leasing of school lands that contain mineral deposits. (Pet. 32a & n.2.) He noted the considerable practical difficulties of requiring prior appraisal of mineral deposits, which are "almost impossible to value until after extensive and often expensive exploration," (Pet. 35a) and concluded that, fully consonant with its obligations as a trustee of the

[16] The trial court stated that it would conduct proceedings to grant "such further relief as may be appropriate and to effectuate the principles" of the Arizona Supreme Court's decision. The "special action relief" sought by plaintiffs is relief that formerly was obtained against "a body, officer or person by writs of certiorari, mandamus, or prohibition." *See* Ariz. R. Proc. Sp. Act. 1.

school lands, "the legislature has properly determined that a fixed-royalty rate appropriately maximizes the revenues to be generated by mineral leases on the school lands." (Pet. 36a.)

SUMMARY OF ARGUMENT

When Congress, in 1910, granted lands for public school support to the new states of Arizona and New Mexico it imposed certain restrictions on the ability of those states to sell or lease the granted lands. The restrictions, which were unique to those two states, were designed to ensure that the experience of some states and territories that had squandered or diverted to other purposes proceeds from the disposition of school lands would not be repeated in New Mexico and Arizona. In accordance with customary practice at that time, the grant expressly excluded mineral lands, and the dispositional restrictions in the act could not have been intended to apply to mineral deposits.

Some seventeen years later in passing the Jones Act, Congress changed its long-standing practice and granted mineral lands to Arizona and other western states that had not received those lands in their original grants. The grantee states were prohibited from selling the mineral deposits in the lands but the deposits were made "subject to lease by the State as the State legislature may direct." The plain meaning of the language Congress used in the Jones Act demonstrates that there was an unqualified grant of leasing authority to the states, not limited by any special dispositional restrictions of the kind imposed in the earlier grants of nonmineral lands to the states. The legislative history confirms the language chosen and demonstrates that Congress recognized that by their nature minerals did not lend themselves to prior appraisal and similar dispositional restrictions, that the western states could be counted on to act responsibly in leasing mineral deposits for the benefit of their public school systems and that those states were entitled to have dominion over minerals in parity with that enjoyed by the eastern states.

The Jones Act, which is not an amendment to any enabling act but a free-standing grant by Congress, establishes a regime for the leasing of mineral deposits that is wholly distinct from and independent of the provisions of the Enabling Act of 1910 and all other enabling acts. The court below erred in inferring that the leasing authority granted to Arizona by subsection (b) of that act was significantly restricted by a clause in subsection (a) of the Jones Act, which provides that the grant of mineral lands "shall be of the same effect as prior grants." That clause makes clear that the conveyancing aspects of the grant of mineral lands would operate in the same manner as prior grants of numbered nonmineral sections. If the restrictions in the various western states' enabling acts applied to mineral lands granted by the Jones Act, then Arizona and New Mexico, because of the extensive restrictions imposed by the Enabling Act, would have been placed at a significant disadvantage relative to other western states. In the Jones Act, however, Congress intended no such result. That legislation was designed to place all of the western states on an equal footing with respect to the disposition of mineral lands. Neither the Enabling Act of 1910 nor the amendments to it in 1936 and 1951 apply in any respect to the mineral lands granted to Arizona and other western states by the Jones Act.

No provision was made in the original Enabling Act for the leasing of lands that were not known to be mineral in character when title passed to the states but were later discovered to contain minerals. By virtue of decisions of this Court, title to such lands was held to pass to the states under the original grants, and the lands were leased by Arizona and New Mexico without regard to the restrictions in the Enabling Act. The first action taken by Congress with respect to the minerals in such lands was in 1936. At that time Congress amended Section 28 of the Enabling Act to authorize Arizona to lease for "mineral" purposes lands granted by that act "in a manner as the State legislature may direct." The essen-

tial purpose of the amendment was to fill a hole left by the Jones Act by making clear that Arizona had the same authority over mineral leasing in lands passing under the Enabling Act of 1910 as it had with respect to lands passing under the Jones Act. Neither in the express language of the 1936 amendment nor in its legislative history is there evidence of any intention on the part of Congress to impose dispositional restrictions upon the leasing authority granted.

The 1951 amendments to the Enabling Act of 1910 were principally concerned with establishing a separate regime for hydrocarbons by permitting leases beyond a twenty-year term and prescribing that the state's royalty should be not less than twelve and one-half percent. That amendment further provides that hydrocarbon leases could be made "with or without advertisement, bidding or appraisement." This provision neither enlarged nor restricted the state's leasing authority with respect to nonhydrocarbon minerals. In view of the separate regime for mineral leasing established by the Jones Act and confirmed in the 1936 amendment to the Enabling Act, the central feature of which was a delegation of leasing authority to the states, it would be erroneous to infer from language applicable only to hydrocarbon leases, as the court below did, that the appraisal provisions in the Enabling Act limit the state's authority to lease nonhydrocarbon mineral deposits.

The proper reading of the four acts of Congress that govern this case is that (1) the Enabling Act of 1910 follows the long-standing practice of reserving mineral lands to the federal government, and it establishes, for Arizona and New Mexico, a uniquely restrictive regime for the disposition of nonmineral lands and surface assets granted thereunder that reflects the concerns of that era as to the maturity of the western states, and (2) beginning in 1927 with the Jones Act and continuing with amendments to the Enabling Act in 1936 and 1951 Congress established quite a different regime for the leasing of mineral deposits which reflects confidence in the ability of the states to act responsibly and a recognition, based largely upon federal experience, that minerals cannot be readily appraised for true value prior to extensive exploration and development. The Arizona statute that provides for the leasing of mineral deposits on a five percent royalty basis constitutes a valid implementation of the broad leasing authority granted the State of Arizona both by the Jones Act and the amendments to the Enabling Act of 1910.

ARGUMENT

I. BOTH THE JONES ACT AND THE ENABLING ACT, AS AMENDED, EXPRESSLY CONFER THE LEASING AUTHORITY EXERCISED BY ARIZONA.

The Jones Act unambiguously provides that mineral deposits "shall be subject to lease by the State as the State legislature may direct." Likewise, Section 28 of the Enabling Act, as amended, most recently in 1951, clearly states that "[n]othing herein contained shall prevent . . . the leasing of any [lands referred to in this section], in such manner as the Legislature of the State of Arizona may prescribe, . . . for mineral purposes, . . . for a term of twenty years or less." The meaning of this statutory language is "uncomplicated," *North Dakota* v. *United States*, 460 U.S. 300, 312 (1983); it vests in the Arizona Legislature authority to lease mineral deposits found in state school lands free of restrictions, including those that Congress chose in the original Enabling Act to apply to the state's disposition of nonmineral school lands. Thus, "[t]he plain meaning of the statute[s] decides the issue presented." *FERC* v. *Martin Exploration Management Co.*, 108 S. Ct. 1765, 1768 (1988) (quoting *Bethesda Hospital Ass'n* v. *Bowen*, 108 S. Ct. 1255, 1258 (1988)).

Because the Jones Act and the Enabling Act, as amended, constitute federal grants to the State of Arizona, any restrictions on Arizona's development of the lands granted by these statutes must be clearly expressed. Like a federal grant under the spending power, a school

land grant is a "solemn agreement" between a state and the federal government, with concessions by both sides. *Andrus* v. *Utah*, 446 U.S. 500, 507 (1980). When conscription of a state rests on the federal government's power to attach conditions to federal grants, this Court has repeatedly required Congress to state its conditions clearly, so that the state will know precisely what rights it must cede by accepting the largess of the federal government. *See, e.g., Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 25 (1981). Only clearly expressed restrictions, not implied ones, can bind Arizona.[17]

A. The Jones Act Grants to Arizona and Other Western States the Authority to Lease Mineral Deposits as Their Legislatures May Direct.

The Jones Act is the act of Congress that expressly grants mineral lands to Arizona (and other western states). Its language controls the state's disposition of known mineral lands because any restrictions on a state's interest in federally-granted lands "depends on the federal law[] that transferred that interest." *Papasan* v. *Allain*, 478 U.S. 265, 289-90 n.18 (1986). That language and the structure of the act demonstrate that it did not incorporate expressly or by implication the restrictions of the original Arizona Enabling Act.

The Jones Act transferred mineral lands to the states by extending grants in place for the support of the public schools to "numbered school sections mineral in character," unless the state had selected other lands in lieu thereof. 44 Stat. 1026 (p. 1a, below). Subsection (a) of the act carefully sets forth the manner, time, and effect of the conveyance, stating that "[t]he grant of numbered mineral sections under this section shall be of

[17] *See also* Penn Dairies v. Milk Control Comm'n, 318 U.S. 261, 275 (1943) ("an unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous"); United States v. Bass, 404 U.S. 336, 349 (1971); FTC v. Bunte Bros., 312 U.S. 349, 354-55 (1941).

the same effect as *prior grants* for the numbered nonmineral sections," and that "titles to such numbered mineral sections shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections." *Id.* (emphasis added). That is, the grant was a separate and independent grant of public lands to the western states, and title would vest in the state upon completion of the federal survey. *See Andrus* v. *Utah*, 446 U.S. at 507.[18]

After describing the nature of the federal conveyance to the states in subsection (a), Congress set forth the restrictions and conditions that apply to the states' subsequent disposition of mineral school lands in a separately lettered subsection (b). That subsection of the act provides:

> "[T]he additional grant made by this act is upon the express condition that all sales, grants, deeds, or patents for any of the lands so granted shall hereafter be subject to and contain a reservation to the State of all the coal and other minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same. *The coal and other mineral deposits in such lands not heretofore disposed of by the State shall be subject to lease by the State as the State legislature may direct*, the proceeds of rentals and royalties therefrom to be utilized for the support or in aid of the common or public schools." [19]

In that subsection, Congress prohibits the states from selling school lands without reserving to themselves the valuable mineral deposits in those lands but expressly authorizes the states to lease the minerals so reserved upon such terms and conditions as the state legislatures consider appropriate. The only other express limitation Congress placed on the states is that the royalties and

[18] The federal survey of lands granted to Arizona has extended over many years and is now substantially complete.

[19] 44 Stat. 1026, codified as amended at 43 U.S.C. § 870 (emphasis added).

other proceeds from the leases be used for the support of public schools. Congress listed, clearly and unambiguously, all of the conditions and restrictions governing the states' disposition of the mineral lands granted therein. This Court should "refuse[] to add to this list by divining some 'implicit' congressional intent." *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 679 (1979).

The Arizona Supreme Court's strained construction of the Jones Act makes the "same effect" language in subsection (a) perform the work of incorporating the original Enabling Act's appraisal and true value restrictions. Such a construction ignores the plain meaning of the statutory language as well as the structure of the act as a whole. The "same effect" language of subsection (a) merely delineates the scope and method of title conveyance as the remaining language of that subsection emphasizes. If Congress had intended the Jones Act to embrace any of the restrictive provisions of the various states' enabling acts, it would have done so in the subsection that specifically sets forth the conditions and restrictions on subsequent conveyances and uses by the states.[20] Moreover, the express requirement that the states must use all proceeds derived from mineral leasing for the support of schools would not have been necessary under the reasoning of the court below, because every relevant enabling act was already to that "same effect." [21]

Finally, Congress in Section 2 of the Jones Act as originally enacted demonstrated that when it intended to

[20] *See* United States v. Naftalin, 441 U.S. 768, 773-74 (1979) (language in one subsection does not restrict other subsections).

Congress used this same format in the Enabling Act of 1910. It described the nature of the grant to the state in one section (§ 24) and the conditions and restrictions on the state's disposition of the granted lands in another (§ 28).

[21] *See, e.g.*, Enabling Act of Wyoming, ch. 664, § 5, 26 Stat. 222, 223 (1890); Enabling Act of Idaho, ch. 656, § 5, 26 Stat. 215, 216 (1890); Enabling Act of North Dakota, South Dakota, Montana, and Washington, ch. 180, § 11, 25 Stat. 676, 679-80 (1889); Enabling Act of Utah, ch. 138, § 8, 28 Stat. 107, 109-10 (1894); Enabling Act of Colorado, ch. 139, § 14, 18 Stat. 474, 476 (1875).

incorporate or preserve provisions of a previous enactment it did so not by implication but with clear and unambiguous language. That section concerns the effect of the act on prior land grants and certain in lieu rights that the states would enjoy. It provides that "all existing laws governing such grants and indemnity or lieu selections and exchanges are hereby continued in full force and effect." 44 Stat. 1027, codified at 43 U.S.C. § 871. Congress' use of similar language concerning the dispositional restrictions in the enabling acts would have been dispositive. But Congress did not use any such language. To read "of the same effect" as doing for the disposition restriction provisions of the enabling acts what the explicit language of Section 2 did for the provisions governing in lieu selections ignores Congress' precision in choice of words.

Other federal grants of land to the states demonstrate that, when Congress intends to incorporate restrictions contained in previous land grants or to qualify the states' legislative authority over granted lands, it will say so clearly. When granting Mississippi new rights with respect to certain in lieu lands, for example, Congress provided that the new lands "shall be holden by the same tenure, and upon the same terms and conditions, in all respects, as the said State now holds lands heretofore reserved for the use of schools in said State." Act of June 23, 1836, ch. 355, § 2, 5 Stat. 116. The absence of any language in the Jones Act qualifying the legislative authority to lease found in subsection (b) or explicitly incorporating the restrictions contained in the original enabling acts provides specific evidence that Congress meant what it said when it gave state legislatures authority over the leasing of mineral deposits. The statutory language providing that mineral lands may be leased "by the State as the State legislature may direct" must be given the meaning it clearly conveys.

B. The Enabling Act, as Amended, Conforms the Treatment of Later-Discovered Mineral Deposits in Arizona School Lands With the Jones Act Grant of Authority to Lease Deposits on Known Mineral Lands as the Legislature May Direct.

The Enabling Act of 1910, as amended, expressly authorizes the Arizona Legislature to lease mineral deposits in lands passing to the state under that act, without regard to the appraisal provisions in that act.

Section 28 of the Enabling Act restricts Arizona in the way it can dispose of lands granted by the act and those lands only. Mineral lands were expressly excluded from the grant. When numbered sections of lands granted to the states "are mineral," the Enabling Act provides that the state may select indemnity lands in lieu thereof, § 24, 36 Stat. 572, and indemnity lands may not be mineral, § 29, 36 Stat. 575. This language makes clear that Congress did not intend to grant any mineral lands to the state under the act. *See United States* v. *Sweet*, 245 U.S. 563, 572 (1918). Section 28's requirements of prior appraisal and leasing at true value apply only to lands "hereby granted," 36 Stat. 574, and, accordingly, they do not apply to mineral lands, which Congress excluded from the grant.

That Congress did not contemplate imposing leasing restrictions on a state's disposition of mineral deposits is confirmed by other language in Section 28. The section says that lands or leaseholds, "*before being offered*, shall be appraised at their true value" (emphasis added). It is virtually impossible to appraise and determine the "true value" of a mineral deposit 'before offering' it for private use because its value cannot be known until after a prospector enters on the land and begins to explore and develop it. On its face, the language Congress chose in 1910 is not applicable to the extraction of minerals.

Any doubt as to the inapplicability to mineral leasing of the act's restrictions is resolved by the 1936 amendment of the original Enabling Act. That amendment brought the Arizona provision of the Enabling Act into

accord with the Jones Act by relieving mineral leases of any restrictive appraisal, true-value, and auction requirements that might have been applicable to the disposition of unknown mineral deposits in lands granted by the original act. In amending the proviso in the third paragraph of Section 28 beginning with the words "nothing herein contained," Congress in clear and concise terms specified that the leasing of any mineral lands for a term of twenty years or less should be "in a manner as the State legislature may direct." 49 Stat. 1477-78 (1936) (p. 10a, below).

In 1951 the third paragraph was again rewritten, but to the same effect: "Nothing herein contained shall prevent . . . the leasing of any of [the lands referred to in this section], in such manner as the Legislature of the State of Arizona may prescribe, . . . for mineral purposes . . . for a term of twenty years or less." 65 Stat. 51, 52 (p. 5a, below). The "nothing herein contained" phrase used in both the 1936 and 1951 amendments encompasses all of the provisions of Section 28—including the requirement of appraisal and sale or lease at no less than appraised value in the fourth paragraph as well as the advertising and bidding requirements of the third paragraph—because Section 28 is a unified whole without separately numbered paragraphs and because the Enabling Act contains numerous instances in which Congress used the word "herein" indisputably to refer to provisions in other paragraphs within a single section. *See, e.g.*, Section 28, first and eleventh paragraphs. At the opposite pole from the "nothing herein" language in Section 28 is the language of the Oklahoma Enabling Act of 1906, which shows that when Congress wants to ensure that specified dispositional restrictions limit the authority of a state to lease state mineral lands, it knows how to state that intention clearly. That act provides that the "legislature of the State may prescribe *additional* legislation governing such leases *not in conflict herewith.*" Ch. 3335, § 8, 34 Stat. 267, 273-74 (emphasis added).

The court below, however, viewed the 1951 amendment as "the most dramatic revision[]" of the Enabling Act (Pet. 18a) and gleaned from the special provision Congress then made for hydrocarbon leases an intent to apply the appraisal provisions of the original Enabling Act to other kinds of mineral leases. Because the 1951 amendment did not expressly state that the state legislature might lease nonhydrocarbon minerals "with or without appraisement" as it did say of hydrocarbons, the court concluded that nonhydrocarbon mineral leases were subject to the appraisal provisions of Section 28. This reasoning ignores the indisputable fact that the entire provision of the third paragraph beginning with the words "nothing herein contained shall prevent," retained and reenacted in the 1951 amendment, was intended to free the state from the restrictions that are otherwise applicable to the types of dispositions listed in that section. It also ignores the central fact that Congress in 1951 was specifically focusing on hydrocarbon leases and gave little, if any, considered attention to other types of mineral leasing.

Congress had no occasion in 1951 to enumerate specific restrictions on the leasing of nonhydrocarbon minerals because it was making no significant changes with respect to such leases. Congress chose not to impose any royalty requirement and not to extend the permissible period of leases, as it did with hydrocarbons. Instead, it continued to provide that nonhydrocarbon mineral deposits might be leased "in such manner as the Legislature of the State may prescribe"—thus reenacting substantially the same provision it had approved for all the states in 1927 and specifically for Arizona in 1936. The statutory language demonstrates that Congress in 1951 said nothing that implied that appraisal or other restrictions of Section 28 applied to nonhydrocarbon mineral leases.

II. THE LEGISLATIVE HISTORIES OF THE JONES ACT AND THE ENABLING ACT, AS AMENDED, AND THE CONTEXTS IN WHICH THEY WERE ENACTED CONFIRM THAT ARIZONA'S MINERAL LEASING AUTHORITY IS NOT LIMITED BY THE APPRAISAL PROVISION GOVERNING NONMINERAL LANDS IN THE ORIGINAL ENABLING ACT.

The Jones Act, the Enabling Act, and the acts amending the Enabling Act were each enacted in a context that demonstrates that Congress intended to give the states wide latitude in the leasing of their mineral lands. The meaning that is indicated by the contexts is confirmed by specific evidence in the legislative histories of the acts.

A. The Appraisal Provision of Section 28 of the Enabling Act of 1910 Was Not Intended to and Does Not Govern the Leasing of Minerals.

The requirement in the Enabling Act of 1910 that land and leaseholds, "before being offered, shall be appraised at their true value" was never intended to apply to the state's leasing of mineral lands. The contemporaneous practice of Congress was "to make a distinction between mineral lands and other lands, to deal with them along different lines, and to withhold mineral lands from disposal save under laws specially including them." *Andrus* v. *Utah*, 446 U.S. 500, 508-509 (1980) (quoting *United States* v. *Sweet*, 245 U.S. at 567-70).[22] Congress did not depart from this practice in the 1910 Enabling Act. (*See* p. 20, above.) It had no reason to consider what kind of regime Arizona and New Mexico should follow in disposing of mineral lands because those lands were ex-

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[22] When Congress has granted mineral lands to a state, it has articulated dispositional restrictions applicable to those lands separate and apart from any restrictions it imposed on the grant of other types of land. *See, e.g.*, Enabling Act of Oklahoma, ch. 3335, § 8, 34 Stat. 267, 273-74 (1906).

pressly reserved to the federal government and were subject to the federal mining laws of 1872. 17 Stat. 91.

The contemporaneous practice of both New Mexico and Arizona demonstrates that neither state believed that the Enabling Act's dispositional restrictions applied to mineral leasing of school lands. Under the principles applied by this Court in *Wyoming* v. *United States*, 255 U.S. 489 (1921), Arizona and New Mexico acquired title to lands in which minerals were discovered after the grant in the Enabling Act became effective. Recognizing that Congress had not made any provision in the Enabling Act for leasing lands of this type, the New Mexico Legislature enacted laws from time to time providing for long-term leasing of the mineral deposits discovered in them without prior appraisal, advertising or public bidding. In 1922 the New Mexico Supreme Court addressed this practice in *Neel* v. *Barker*, 204 P. 205 (N.M. 1922), and held that such lands passed to the state free of the dispositional restrictions that the Enabling Act imposed on the leasing of agricultural lands and surface assets.

The New Mexico court reasoned that, because Congress did not intend to grant any mineral lands to the state by the Enabling Act of 1910, it "certainly did not contemplate that the state should follow certain formalities in the execution of leases for mineral purposes . . . . When Congress used the word 'lease' with respect to lands it considered and denominated as nonmineral, it certainly did not have in mind a mineral lease." 204 P. at 207. *See also* S. Rep. No. 9, 70th Cong., 1st Sess. 2 (1928).

Like New Mexico, Arizona did not believe that the 1910 Enabling Act restricted its mineral leasing authority over the state's vested school sections. In 1915 the state legislature enacted Arizona Public Land Code § 38, Act of 1915, ch. 5, 2d Sp. Sess., which tracked federal laws governing mining on public lands. The Arizona statute provided that any United States citizen could locate a mineral claim on state lands and receive a lease

to develop the deposit. Prior appraisal of the area, public bidding, and leasing at true value were not required.

These actions by Arizona and New Mexico were at no time challenged by the federal authorities responsible for enforcing the terms of the Enabling Act.[23] Indeed, when Congress specifically addressed the New Mexico practice in 1928 it did not disapprove the reasoning or the result in the *Neel* case, but enacted a joint resolution authorizing a plebiscite through which the citizens of New Mexico could approve the state's mineral leasing practices. The resolution authorized New Mexico to lease mineral lands that passed inadvertently to the state under the 1910 Enabling Act "under such provisions relating to the necessity or requirement for or the mode and manner of appraisement, advertisement, and competitive bidding and containing such terms and provisions, as may be provided by act of the [state] legislature." S.J. Res. 38, ch. 28, 45 Stat. 58 (1928). The citizens of New Mexico approved of this result in the plebiscite. The joint resolution did not amend the New Mexico-Arizona Enabling Act; it simply confirmed the power of the state legislature to allow leasing of mineral lands without appraisal and other dispositional restrictions.

The manner in which New Mexico, Arizona and the Attorney General dealt with minerals in granted lands in the years immediately following passage of the Enabling Act of 1910 is highly significant in determining the intent of Congress. *See Solem* v. *Bartlett*, 465 U.S. 463, 471 (1984). At all times those authorities proceeded on the entirely reasonable assumption that the state was authorized to develop and lease mineral lands without a prior appraisal of the individual area and a leasing at "true value." These practices are entitled to

[23] The United States Attorney General is expressly empowered to enforce the provisions of the act, § 29, 36 Stat. 575, and has sought injunctions to prevent misuse of school lands or funds in other contexts. *E.g.*, United States v. Ervien, 246 F. 277 (8th Cir. 1917), *aff'd*, 251 U.S. 41 (1919).

"very great respect." *Mountain States Telephone & Telegraph* v. *Pueblo of Santa Ana*, 472 U.S. 237, 254 (1985).

B. The Jones Act of 1927 Constitutes the Basic Determination by Congress With Respect to the Disposition of Minerals in the Western States, Including Arizona.

By 1927 Congress had recognized that Arizona and the other western states were responsible centers of government; the concerns that prompted the restrictions applicable to the leasing of nonmineral lands in the Enabling Act of 1910 no longer obtained. Congress also recognized that western states were disadvantaged relative to the eastern states, many of which had full control over the lands within their borders and could tax that property for the benefit of their schools or for other purposes. Congress also recognized that mineral lands are different in kind from the lands it previously granted to the western states, necessitating different treatment. These considerations coalesced in 1927 to produce legislation, the Jones Act, that placed the ownership and leasing of mineral lands squarely in the hands of the respective western states.[24]

1. Congress Recognized That the Western States Could Be Expected to Act Responsibly in Leasing Minerals for the Benefit of Their Public Schools.

In the Enabling Act of 1910, like the enabling acts of other western states, Congress excluded known mineral lands from the grant of numbered school sections in place. The excluded lands were not identified by section, nor were any patents issued to the states for the nonmineral lands that fell within the terms of the various grants. Without any firm evidence of title or any clear designation of which school lands were excluded because

[24] The states principally affected by the Jones Act are Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. *See generally* S. Rep. No. 603, 69th Cong., 1st Sess. 5 (1926).

of their mineral character, "there [was] no absolute assurance that the title ha[d] passed to the State[s]." *To Assure Title to Granted School Lands: Joint Hearings on S. 3078 and H.R. 9182 Before the Senate Comm. on Public Lands and Surveys and the House Comm. on the Public Lands*, 69th Cong., 1st Sess. 9 (1926) (hereinafter cited as "*Joint Hearings*") (testimony of Assistant Secretary of the Interior Finney).

This uncertainty created an "intolerable situation" for the western states. *Id.* at 1 (testimony of Senator Smoot). They were subjected to costly and vexatious litigation, resulting more often than not in the loss of the contested lands. *See id.* at 9, 10, 24. In addition, the cloud upon the states' title to school lands, which continued indefinitely for lack of a statute of limitation, made it difficult for the states to dispose of them, hampering development and depriving the public schools of needed revenues. S. Rep. No. 603, 69th Cong., 1st Sess. 5 (1926).

Members of Congress from the western states attempted to dispel these uncertainties as early as 1912, in the 62d Congress, and they continued to press for legislation until the Jones Act was passed in 1927. Four general types of bills were introduced during this period. Some bills purported to confer upon the Interior Department the authority to issue patents to the states for nonmineral lands and provided a procedure by which a state could list with that agency any granted section of land in place to obtain firm assurance of title upon a determination by the Secretary of the Interior that such lands were not of known mineral character.[25] Others merely provided a period within which challenges to the western states' title to school lands in place must be asserted.[26]

[25] *See* S. 6507, 62d Cong., 1st Sess. (1912); S. 2911, 63d Cong., 1st Sess. (1913); S. 3305, 66th Cong., 1st Sess. (1919).

[26] *See* S. 1721, 67th Cong., 1st Sess. (1921); S. 2317, 67th Cong., 1st Sess. (1921); S. 2318, 67th Cong., 1st Sess. (1921); H.R. 6158, 67th Cong., 1st Sess. (1921); H.R. 6260, 67th Cong., 1st Sess. (1921); S. 1527, 68th Cong., 1st Sess. (1923); H.R. 5210, 68th Cong., 1st Sess. (1924); S. 3982, 69th Cong., 1st Sess. (1926).

Still others purported to issue patents to the state or to a state's grantee for the surface rights of school lands, whether mineral or not, while reserving to the United States all title to the minerals contained in the lands.[27] Under any of these three types of bills, known mineral lands (or mineral deposits) would continue to be withheld from the state. And each underscored the uncertainty of the states' title to school lands in place by making the effect of the prior federal grant of school lands contingent upon the passing of a specified period of time or upon the states' acquisition of patents. *See Joint Hearings, supra,* at 18 (testimony of Representative Colton).

The fourth class of bills included S. 564 in the 69th Congress—the bill that eventually became the Jones Act.[28] It provided forthrightly for relinquishment by the United States of all right and title to any numbered sections of land granted to the states for the support of public schools, regardless whether those lands were mineral in character. In so doing, S. 564 would "immediately terminate the 'vexatious and costly litigation'" to which the states were subjected—a result not achieved by the other classes of bills. S. Rep. No. 603, *supra* at 1-2. Importantly, these bills would also effect a change in federal-state relations, transferring from the federal government to the states control over a vast store of wealth.[29]

[27] *See* S. 889, 67th Cong., 1st Sess. (1921); S. 671, 68th Cong., 1st Sess. (1923); S. 3412, 68th Cong., 1st Sess. (1924); S. 2585, 69th Cong., 1st Sess. (1926); S. 3078, 69th Cong., 1st Sess. (1926); H.R. 7910, 69th Cong., 1st Sess. (1926); H.R. 9182, 69th Cong., 1st Sess. (1926).

[28] 69th Cong., 1st Sess. (1925).

[29] *See Title to Lands Granted by the United States In Aid of Schools: Hearings on S. 564 Before the House Comm. on Rules,* 69th Cong., 2d Sess. 11 (1926) (hereinafter cited as "*Hearings on S. 564*") (remarks of Rep. Colton, acknowledging that S. 564 would take from the federal government control over mineral resources and place it in the states).

As reported out of the Senate Committee on Public Lands and Surveys, the Jones bill contained no restrictions on the rights of the grantee states to sell or lease the relinquished mineral lands, nor did the proposed legislation direct the states to devote the proceeds from such sales or leases to particular uses. The members of the Senate committee expressed confidence that the states would manage these lands prudently and thereby benefit their public schools. S. Rep. No. 603, *supra,* at 7. The Senate committee's report stated that, by granting without qualification these mineral lands to the western states, the bill would "tend to put them on a somewhat equal basis with the original states," all of which had "secured outright, without reservation, the lands within their borders." *Id.* at 6.[30]

In the House, however, the Jones bill faced opposition from members who feared that it "might go too far against the principle of conservation" because it would have permitted the states to sell the valuable mineral deposits to private interests. *Hearings on S. 564, supra,* at 6. To allay these fears, the House committee amended the bill by requiring states to reserve mineral rights to themselves. To ensure that the states could obtain needed revenues from these minerals however, the Committee specified that "[t]he coal and other mineral deposits . . . shall be subject to lease by the State . . . as the State . . . legislature may direct," provided that the proceeds be used for the support of public schools. *See* H.R. Rep. No. 1617, 69th Cong., 2d Sess. 1 (1926).

The House recognized, as the Senate had, that the states should be treated as "sovereigns rather than subjects," and that they could be relied upon to manage the newly granted lands in a manner that would conserve mineral resources, encourage investment in state-owned

[30] It was not until 1875, in the Enabling Act of Colorado, ch. 139, § 14, 18 Stat. 474, that Congress sought to control by restriction the manner in which the states could dispose of federally granted school lands. *See* Hibbard, *A History of the Public Land Policies* 317 (1939).

lands, and enhance the quality of their public schools. *Id.* at 14-15. Representative Sinnott explained the reasons for the amendments and their effects:

> "We have inserted in the House bill, measures along conservation lines. We provide that the State cannot make an absolute grant of the minerals, after the passage of this Act. *The only way a State can dispose of the minerals is through the leasing system, proposed and passed by the State legislatures.* We feel that in these days the State legislatures can be depended upon to be just as zealous and just as jealous of the public school fund as the Federal Government can be. We believe that we will get safe and prudent laws enacted by our legislature, guarding these oils and these minerals." [31]

This discussion of leasing in the legislative history of the Jones Act makes clear that Congress intended to give the state legislatures absolute control over leasing, with confidence that the actions taken by the states would be "safe and prudent." Nowhere in the legislative history are there any references to appraisal or public auction restrictions of the type found in Arizona's enabling act. Congress decided that it was up to the state legislatures, not the federal government, to enact legislation "as a complete safeguard" against any repetition of past improvidence. 68 Cong. Rec. 1820 (1927) (remarks of Rep. Morrow).

2. *Congress Recognized That Dispositional Restrictions of the Kind the Enabling Act Applied to Nonmineral Lands Could Not Practicably Be Applied to Mineral Lands.*

The Jones Act's grant of mineral lands to the western states differed in kind from previous land grants, and although the particular problems of leasing mineral lands were not discussed at length, the legislative history shows that Congress understood that dispositional restrictions such as a prior appraisal requirement would have been impracticable if applied to mineral leases.

[31] *Hearings on S. 564, supra,* at 6 (emphasis added).

In hearings on various bills introduced in the 69th Congress to deal with problems associated with the reservation of mineral lands from the grants of school lands to the western states (including the Jones bill) mention was made of a bill that had been introduced by Senator Smoot in the 67th Congress. That bill would have conferred rights on any good faith purchaser of state school lands that were later determined to have been reserved because of their mineral character. Pursuant to this bill, these purchasers would obtain "a confirmatory patent from the United States with the reservation of the mineral deposits in the land to the United States . . . upon payment of $1.25 per acre, or to a patent without such reservation . . . upon payment of the appraised price of the land, as such purchaser may elect." S. 889, 67th Cong., 1st Sess. (1921). The bill was amended in committee, at the suggestion of Secretary of the Interior Fall, to exclude metalliferous deposits from the appraisal requirement, and the amended bill passed the Senate without objection. Secretary Fall explained that such an amendment was necessary because *"it would be practically impossible to appraise the lands containing metalliferous deposits the extent or value of which can not be known until they are mined and removed."* [32]

Similarly, in the Senate committee's report accompanying the bill that became the Jones Act, the committee noted that the mineral character of land is often unknown or purely speculative until "extensive and expensive exploration work has been carried on" or until "science has developed a new process making valuable a deposit which theretofore had no value." S. Rep. No. 603, *supra,* at 5. Congress well understood that the distinctive nature of mineral deposits, and the difficulty of appraising their value before they are leased necessitated

[32] Letter of July 20, 1921, from Secretary of the Interior Fall to Senator Smoot, Chairman of the Senate Committee on Public Lands and Surveys, *reprinted in Joint Hearings, supra,* at 119 (emphasis added).

a kind of leasing regime different from that applied to agricultural, timber, or grazing lands.

3. *Congress Did Not Intend to Incorporate the Restrictions of the Several States' Enabling Acts in the Jones Act Grant of Mineral Lands.*

The Arizona Supreme Court erred in believing that Congress intended the language, "the grant of numbered mineral sections under this act shall be of the same effect as prior grants," to refer to anything more than the particulars of the conveyance, such as the effective date of the grant, the manner in which lieu selections were to be made, and so on. The legislative history confirms that that language was not intended broadly to embrace the restrictive provisions of the enabling acts of the various western states.

The "same effect" language was added to S. 564 only after Congress had considered what restrictions should be placed on the states. The only express restrictions Congress intended to impose were contained in the first amended version of S. 564 that was reported out of the House Committee on the Public Lands. That version of the bill did not contain the "same effect" language or anything like it.

The "same effect" language—indeed, the entirety of subsection (a) of the Jones Act—was drafted by Secretary of the Interior Work and was included in a substitute bill he presented to the House Committee on the Public Lands. The revisions in this substitute bill were merely intended to clear up any ambiguities in the language of the previous House bill and to exclude from the additional grant all lands in what was then the Territory of Alaska. Otherwise it did not differ substantively from the prior version.[33]

[33] *See Hearings on S. 564, supra*, at 29-31 (testimony of Hubert Work); H.R. Rep. No. 1761, 69th Cong., 2d Sess. 2 (1927); 68 Cong. Rec. 2581 (1927) (remarks of Senator Winter).

In a letter accompanying his substitute bill, Secretary Work did not refer to any extant restrictions on the states' ability to dispose of nonmineral school lands, nor is there the slightest indication that the language he chose in subsection (a) was intended to incorporate those restrictions. Instead, Secretary Work explained the purpose of that subsection as follows:

> "Under the bill title to numbered school sections containing minerals passes and vests in the same manner as under the prior grants for the numbered nonmineral sections, subject to the rights of adverse parties recognized by law. The last clause is for the purpose of protecting, as do the grants heretofore made, those citizens who make homestead settlement, mineral location, or initiate other claims permitted by law upon the lands prior to their identification by survey."[34]

The "same effect" language, as Secretary Work explained, accomplishes nothing more than to clarify that the lands granted under the Jones Act "pass[] and vest[] in the same manner" as prior grants of numbered school sections. The legislative history of the Jones Act thus confirms that the entirety of subsection (a) of the act was intended to refer to the mechanics of the grant and the vesting of title; in this respect only would the additional grant made in the Jones Act be "of the same effect" as the prior grants in each of the western states' enabling acts.

Finally, if Congress had wanted to exercise federal control over the states' leasing of mineral lands when it passed the Jones Act in 1927, it certainly would have treated the states uniformly and imposed the same rules on all of them. The imprudent practices of earlier states and territories, which had squandered valuable school assets, are what prompted Congress to impose the especially stringent dispositional restrictions on Arizona and New

[34] H.R. Rep. No. 1761, *supra*, at 2.

Mexico in 1910.[35] *See Murphy* v. *State*, 181 P.2d 336, 344 (Ariz. 1947). There is no reason why Congress in 1927 would have intended to permit those earlier, errant states to have greater freedoms than Arizona and New Mexico could enjoy. Moreover, at the time of the Jones Act, Congress was preparing a joint resolution that would expressly free New Mexico from any dispositional requirements in the Enabling Act with respect to that state's leasing of state school lands for mineral purposes. (*See* p. 25, above.) It is inconceivable that Congress intended to single out Arizona of all the beneficiaries of the Jones Act.

C. Federal Laws Historically Have Not Required Appraisal Before Minerals Are Offered for Lease.

Congress' intent not to require a prior appraisal of mineral deposits when it granted lands to Arizona in 1910 and 1927 is confirmed by contemporaneous federal laws governing mineral development on public lands. These federal laws do not require mineral deposits to be appraised at true value before being offered for development by private interests. The 1910 and 1927 grants must be appreciated in "the environment out of which" they came, *Burlington Northern R.R.* v. *Brotherhood of Maintenance of Way Employes*, 107 S. Ct. 1841, 1850 (1987), including their "contemporary legal context," *Mountain States Telephone & Telegraph* v. *Pueblo of Santa Ana*, 472 U.S. 237, 252 (1985) (citation omitted).[36]

[35] The restrictions placed upon the various western states differed considerably, but of the states affected by the Jones Act, only New Mexico and Arizona were required to appraise school lands before disposing of them. Some acts required that any sale of school lands be done by public sale. *See* Enabling Act of Wyoming, ch. 664, § 5, 26 Stat. 222, 223 (1890); Enabling Act of Idaho, ch. 656, § 5, 26 Stat. 215, 216 (1890); Enabling Act of North Dakota, South Dakota, Montana, and Washington, ch. 180, § 11, 25 Stat. 676, 679, 680 (1889) (also requiring price of not less than $10 per acre); Enabling Act of Colorado, ch. 139, § 14, 18 Stat. 474, 476 (1875) (also requiring price of not less than $2.50 per acre). Utah's Enabling Act did not contain either an appraisal or a public sale requirement. Ch. 138, § 8, 28 Stat. 107, 110 (1894).

At the time of the grants to Arizona, it was the practice of Congress to deal with minerals "along different lines . . . under laws specially including them."[37] The federal laws dealing specifically with minerals have always recognized that mineral exploration, development and extraction is an integrated process. Accordingly, those laws confer upon the discoverer of deposits preferred or vested rights to extract the minerals.[38] Federal laws do not require mineral ores to be appraised before being offered for leaseholds or patents.

The federal mining laws of 1872, which governed all valuable minerals except coal when the 1910 Enabling Act was passed, embrace the location method of staking claims.[39] A locator obtains an exclusive right of possession against others in a discovered deposit and then, upon payment of a set fee per acre, receives a patent to the land from the federal government. 30 U.S.C. §§ 21-54. The federal location law has never contained anything like an appraisal requirement. On its face the federal mining laws of 1872 continue to apply to all "valuable mineral deposits," *id.* § 22, but since the passage of the Mineral Leasing Act of 1920 and other legislation, the 1872 act now chiefly governs metalliferous ores such as the copper and silver prevalent in Arizona.[40]

[36] *See also* Leo Sheep Co. v. United States, 440 U.S. at 669 ("courts in construing a statute, may with propriety recur to the history of the times when it was passed"); Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 563 (1980).

[37] United States v. Sweet, 245 U.S. at 567.

[38] An exception is that the Mineral Leasing Act of 1920 requires public bidding for *proven* hydrocarbon fields. 30 U.S.C. § 226.

[39] Act of May 10, 1872, ch. 152, 17 Stat. 91.

[40] Approximately forty-four percent of the total acreage of Arizona is owned by the federal government and a substantial amount of that land is governed by the federal mining laws of 1872. Depart-

In 1920 Congress passed the Mineral Leasing Act, which applies to oil, gas, coal, oil shale, sodium, and phosphate. 41 Stat. 437, codified as amended at 30 U.S.C. §§ 181-287. For those principally hydrocarbon minerals, the federal act establishes leasing terms, grants preferred rights to prospectors and governs royalty rates and bonus payments for the extraction of specified minerals. The Mineral Leasing Act of 1920 does not require a prior appraisal to determine the true value of mineral deposits before offering them for lease.

The reason for this "different treatment" of minerals in federal laws relates to the practicalities of mineral development. It is extremely difficult and costly to appraise mineral deposits, and an appraisal of true value usually cannot be made at any cost before the lands are offered to a private prospector or locator for development. When a fair market value must be put on a condemned mining area to satisfy the requirement of just compensation under the Fifth Amendment, this Court and others have commented frequently on the difficulties of appraising mineral lands, even those that have been explored and developed and are known to contain ore reserves.[41] The contemporaneous federal practice on mineral extraction confirms that Congress, recognizing the impracticality of appraising mineral deposits, did not intend to impose on Arizona the appraisal and related dispositional requirements in the Enabling Act when it granted mineral lands to the state.

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ment of the Interior, Bureau of Land Management, *Public Land Statistics*, Vol. 172, Tables 4, 5 (1987).

[41] *See, e.g.*, Montana Ry. v. Warren, 137 U.S. 348, 352 (1890); United States v. 103.38 Acres of Land, More or Less, 660 F.2d 208, 210, 213 (6th Cir. 1981); United States v. 2,847.58 Acres of Land, More or Less, 529 F.2d 682, 684-87 (6th Cir. 1976). *See also* 1 Rocky Mountain Mineral Law Foundation, *American Law of Mining* § 11.11 (2d ed. 1988) ("the existence of known mineral values in either the offered or selected lands introduces an extremely difficult factor into the appraisal process").

D. The Amendments to the Enabling Act of 1910 Were Intended to Confirm the Broad Authority to Lease Mineral Lands Granted Arizona in the Jones Act.

The history of subsequent amendments to the Enabling Act of 1910 confirms that Congress clearly intended to permit the Arizona Legislature to lease mineral lands without following the procedures imposed by that act on the state's disposition of nonmineral lands and surface assets.

1. By the 1936 Amendment Congress Undertook to Deal With the Leasing of Later-Discovered Mineral Deposits Consonantly With the Way the Jones Act Had Dealt With the Leasing of Known Mineral Deposits.

In 1936, Congress recognized that, although the Jones Act granted mineral lands to Arizona and delegated broad authority to the state legislature to determine the means and manner by which those lands are leased, title to school sections containing minerals may have vested in the state under the grant made by the Enabling Act because their mineral character was not discovered until after the grant became effective. *See* S. Rep. No. 1939, 74th Cong., 2d Sess. 2 (1936); *Wyoming* v. *United States*, 255 U.S. 489 (1921). Because Congress did not in the Enabling Act intend to convey any mineral lands, however, "[t]here [was] *no provision* in [that legislation] for the development or protection of minerals on such lands." S. Rep. No. 1939, *supra*, at 2 (1936) (emphasis added). Nor did the provisions of the Jones Act apply to these later-discovered mineral lands, and the states thus "ha[d] the right to dispose of such lands including their mineral contents." *Id.* Congress filled the gap in the coverage of the Enabling Act when it amended Section 28 in 1936.

Congress amended the Enabling Act of 1910 by striking from the proviso in the third paragraph of Section 28 the words "nothing herein contained shall prevent said proposed States from leasing any of said lands referred to in this section for a term of five years or less without

said advertisement herein required." This language was replaced by a provision stating that the state could lease lands for specific purposes, including mineral development, for longer terms in such a manner as the state legislature should direct:

> "*Provided*, That nothing herein contained shall prevent said State of Arizona from leasing in a manner as the State legislature may direct, any of said lands referred to in this section for grazing and agricultural purposes for a term of ten years or less, or from leasing any of said lands for mineral purposes (including leases for exploration of oil and gas and extraction thereof) for a term of twenty years or less . . . ."[42]

Both the House and the Senate committees concluded that the purpose of the amendment was "to remove certain restrictions contained in the Enabling Act and *to liberalize* the provisions of said act with respect to the disposition and leasing of lands granted by said act to the State of Arizona." S. Rep. No. 1939, *supra*, at 2 (letter from Secretary of the Interior West) (emphasis added); H.R. Rep. No. 2615, 74th Cong., 2d Sess. 2 (1936) (same).[43] This "liberalization" was deemed appropriate because "[t]he experience the State has now had in managing its lands would seem to warrant removing the restrictions placed on its grant to the extent proposed by [the amendment]." S. Rep. No. 1939, *supra*, at 3; H.R. Rep No. 2615, *supra*, at 3.

The experience of Arizona in leasing mineral lands to which the committee reports approvingly referred was then, as it had always been, to grant preferred rights

[42] 49 Stat. 1477, 1478 (1936) (p. 10a, below). The act further amended the Enabling Act by striking from the fifth paragraph of Section 28 the minimum fixed price ($3.00/acre) for the sale of lands, and also made provision by which the state could exchange state-owned lands for other lands, whether public or private.

[43] By referring only to the lands conveyed by the Enabling Act, the committees made clear that the amendments did not affect the Jones Act provisions governing the state's leasing of mineral lands.

to locators and prospectors of mineral deposits without requiring a prior appraisal of the areas before they are offered and without leasing at an appraised value. (Pp. 24-25, above.) The 1936 amendments endorsed this practice and harmonized the terms of the Enabling Act with the liberal leasing regime established by the Jones Act. S. Rep. No. 1939, *supra*, at 2-3; H.R. Rep. No. 2615, *supra*, at 2-3.

In 1941, shortly after the passage of these amendments, Arizona enacted the royalty statute that has governed mineral leasing in the state for almost fifty years and which, like its predecessor, requires neither an appraisal of each mineral area before it is offered nor leasing at an appraised value.

2. *The 1951 Amendment Was Not Intended to Alter the Regime Established by the Jones Act and the 1936 Amendment for the Leasing of Nonhydrocarbon Minerals.*

In 1951, Congress again amended Section 28 of the Enabling Act. 65 Stat. 51 (p. 4a, below). While the amendment clarified the authority of the state to lease for mineral development lands also leased for grazing and agricultural purposes, its principal purpose was to establish a new regime for the leasing of hydrocarbons (chiefly oil and gas) that was not applicable to other types of minerals. The amendment permitted leasing "for an initial term of twenty years or less and as long thereafter as oil, gas, or other hydrocarbon substance may be procured therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe" and mandated a production royalty on hydrocarbon leases of not less than twelve and one-half percent.

The Senate and House committee reports, which are virtually identical, state that the purpose of the amendment was "to enable Arizona to develop her public

lands, particularly with respect to production of oil and gas, for the benefit of her schools and for other public purposes." S. Rep. No. 194, 82d Cong., 1st Sess. 1 (1951); H.R. Rep. No. 429, 82d Cong., 1st Sess. 1 (1951). The reports identified two restrictions that seemed particularly "harmful": (1) "the lack of provision for oil and gas leases for an initial term and as long thereafter as oil and gas are produced"; and (2) "a 10-week detailed advertisement which must appear in two newspapers in different localities." H.R. Rep. No. 429, *supra*, at 2; *see also* S. Rep. No. 194, *supra*, at 1-2.

The 82d Congress may have been under the impression that the Enabling Act of 1910, as amended in 1936, imposed some leasing restrictions—at least advertising—on the state with respect to the leasing for mineral purposes of the lands granted therein. The language and legislative history of the 1910 act and the 1936 amendment, however, make clear that requirements such as advertising had not in fact been imposed on the state's authority to lease lands for mineral purposes for twenty years or less. Despite this confusion in the legislative history of the 1951 amendments, the overall intent of the 82d Congress is clear. The Senate Report states:

> "The committee wholeheartedly concurs with the Secretary of the Interior in believing that—
>
> > the Legislature of the State of Arizona could best determine what procedures would be most fruitful in producing income from and obtaining the maximum utilization of the granted lands." [44]

Congress again intended to free the state from burdensome leasing procedures.

The intent to "liberalize" is also manifest in the amendments made by the Senate Committee on Interior and Insular Affairs. The original bill would have

[44] S. Rep. No. 194, *supra*, at 2.

changed the proviso in the third paragraph of Section 28 in part to read: "Nothing herein contained shall prevent . . . the leasing of any of said lands, in such a manner as the Legislature of the State of Arizona may prescribe . . . for mineral purposes [except for hydrocarbon leasing] for a term of twenty years or less, *without advertising*." S. Rep. No. 194, *supra*, at 5 (emphasis added). The Committee "deemed it advisable to eliminate the words 'without advertising'" in order to "place[] [Arizona] on an equal footing with the greater number of her sister States in respect to the type of leases for which provision is made." *Id.* at 2. These sister states "ha[d] been able progressively to liberalize the terms of leases of their State lands, thus placing Arizona at comparative disadvantage." *Id.* The report noted that states like New Mexico (by virtue of the 1928 joint resolution), Wyoming, North Dakota, South Dakota, Montana, and Washington were able to lease school lands for mineral purposes "without restriction" as to manner and conditions. *Id.* at 2-3.

The same Senate committee report also makes clear that Congress was aware that leases for up to ten years of agricultural and grazing lands were exempt "from the restrictions contained in the original Enabling Act." *Id.* at 2. That exemption must have been in the "nothing herein contained" proviso of Section 28 of the Enabling Act; there is no other possible statutory source of the exemption. One of the effects of the 1951 amendments, according to the Senate report, was to extend the original exemption to include leases for commercial and home site purposes. *Id.* If, as Congress recognized in 1951, the proviso in Section 28 exempts agricultural and grazing leases from the restrictions of the Enabling Act, then it necessarily follows that mineral leases, contrary to the assumption of the court below, are similarly exempt, because they are covered by the same "nothing herein contained" proviso.

Taken as a whole, the legislative history of the 1951 amendments to the Enabling Act establishes that Con-

gress intended further liberalization of the state's authority to make hydrocarbon leases and no change in the state's authority over nonhydrocarbon leasing other than to authorize leasing on grazing and agricultural lands.

E. The Decision in *Alamo Land and Cattle Co.* Does Not Interpret the Jones Act or Otherwise Govern the Leasing of Minerals.

The court below was mistaken in believing that this case is controlled by the Court's decision in *Alamo Land and Cattle Co.* v. *Arizona*, 424 U.S. 295 (1976). The issue in *Alamo* was whether a grazing lessee of state school lands has a compensable interest in such lands upon condemnation. This Court held that a lessee could have such an interest and remanded for a determination whether the lessee in that case had a valid lease from the state and if so how that lease should be evaluated. The Court's holding in *Alamo* decided only that the lessee could share condemnation proceeds with the state. In so ruling, the Court stated that a lessee is not entitled to receive compensation upon condemnation of state lands when he holds a lease at less than its "true value," 424 U.S. at 311, but that conclusion concerns a different question from the question whether the state legislature had the power as an initial matter to issue the grazing lease without prior appraisal of the area. The dissenting opinion in *Alamo* makes clear that condemnation of state school lands involves considerations quite apart from the validity of a lease. 424 U.S. at 311.

Moreover, mineral leasing was not at issue in *Alamo*. The Court had no occasion to consider the Jones Act of 1927, which is the source of the mineral leasing authority expressly granted to Arizona and other western states. Nor did it consider whether the appraisal requirement in the Enabling Act of 1910 has any application to mineral lands that were expressly excluded from that initial grant.

The Court in *Alamo*, was not asked to, and did not, consider whether the 1936 and 1951 amendments to Section 28 extended the exemption from the dispositional restrictions that the original Enabling Act provided for leases of five years or less. That such was the purport of the amendments is even clearer in the case of mineral leases because of the Jones Act, which unequivocally states the will of Congress with respect to such leases while saying nothing about grazing leases.

Because the issue decided in *Alamo* was not the authority of the state legislature to lease mineral deposits, a matter that has been the subject of explicit congressional action, and because the effect of the amendments to the Enabling Act was not considered in that case, *Alamo* does not resolve the question presented here.

III. RESPONDENTS' REAL COMPLAINT—THAT ARIZONA HAS CHOSEN A FIXED ROYALTY METHOD OF LEASING MINERAL LANDS RATHER THAN SOME OTHER METHOD THAT THEY ALLEGE MIGHT RAISE MORE REVENUE—RAISES AN ISSUE OF POLICY THAT HAS BEEN RESOLVED BY THE ARIZONA LEGISLATURE PURSUANT TO AUTHORITY GRANTED BY CONGRESS.

The impracticability of applying a prior appraisal requirement to mineral leases has long been recognized. No one in this litigation or outside of it can refute the Secretary of the Interior's statement (p. 31, above) that "it would be practically impossible to appraise the lands containing metalliferous deposits the extent or value of which cannot be known until they are mined and removed." What the Secretary said back in 1921 was true then and remains true today; the soundness of his observation is confirmed by the mineral leasing practices of the federal government and by federal laws governing the other western states, which do not attempt to prescribe the "practically impossible." (*See* pp. 34-36 & n.35, above.)

Respondents' real complaint must therefore be that Arizona takes a uniform royalty of five percent on the minehead value of minerals extracted pursuant to state leases. They think that a uniform royalty yields less

money to support the public schools than would some other leasing regime, such as negotiated royalty rates or, perhaps, simply a higher uniform rate. Arizona cannot claim unanimity of the jurisdictions for its particular royalty regime, though it is by no means unique (*see* p. 8, n.13, above), but it can claim a reasoned legislative judgment that a uniform five percent royalty rate best serves Arizona's public schools by encouraging the location and exploitation of mineral deposits, without which any mineral leasing system is words on paper yielding no revenues. Justice Cameron, dissenting below, pointed out that on the record in this case California's high minimum royalty rate was self-defeating—"one of the primary reasons for the lack of metallic mineral production" from that state's public lands. (Pet. 35a.)

Respondents' assertion may ultimately be that, without regard to the specific but inherently inapposite statutory restrictions that they and the majority below strain to apply to mineral leases, Arizona is in breach of some general trust principles that they say apply to the state's management of the school lands. If so, then Justice Cameron gave the complete answer in his dissent. He assumed that the state took its mineral lands in trust, though the Jones Act does not say so and this Court has recognized that not all school lands are held in trust,[45] and he then said:

> "In reviewing the testimony in the trial court, I believe there is sufficient evidence from which it can be found that a royalty of five percent returns an equal if not a greater amount to the school trust account than could be obtained through other methods of leasing. The legislature, in establishing a royalty rate, may balance the revenues to be received with the discouragement of future mining operations that might occur with the imposition of higher royalty rates." (Pet. 34a.)

This is not to say that the balance struck by the Arizona Legislature is the only permissible balance. Respondents are free to attempt to persuade their representatives in the legislature that another mineral leasing regime would indeed yield more revenues. But in striking the balance it has the legislature clearly acted within the bounds of the discretion that Congress accorded it and with fidelity to whatever fiduciary obligation it has. Respondents cannot properly ask this Court to dictate an end to Arizona's present mineral leasing regime because neither federal statutes nor, if they are relevant, general trust principles condemn the system that Arizona has used for nearly fifty years. In adopting that system in 1941, the Arizona Legislature was able to harmonize the not entirely congruous provisions of the Jones Act and the amended Enabling Act. It limited nonhydrocarbon mineral leases to twenty years as the amendments to the Enabling Act require for after-discovered mineral deposits though the Jones Act provides no such temporal limitation on leases of known mineral deposits. The Arizona statute also forbids the sale of all mineral lands owned by the state, including those that passed under the Enabling Act, even though the Jones Act's prohibition against sale applies only to known mineral lands.[46]

For many years mining companies and individual prospectors, including petitioners, have invested heavily in mineral exploration and development in Arizona confident that the state mining laws would assure them enjoyment of any discovered deposits at a predictable royalty rate. Extension of Section 28's appraisal requirements well beyond their intended scope would have a profoundly adverse effect on these individual investors and mining companies and would upset decades of private activities built in good-faith reliance on the state's longstanding posture on mineral leasing. This reliance constitutes a further reason why the state statute should stand. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 458 (1978); *Udall* v. *Tallman*, 380 U.S. 1, 17-18 (1965). Moreover, this Court traditionally has recog-

[45] *See* Papasan v. Allain, 478 U.S. at 289-91 n.18.

[46] *See* Ariz. Rev. Stat. Ann. §§ 27-235(A), 37-231(D), (E).

nized the importance of "certainty and predictability" in land tenure systems and has been especially sensitive to settled expectations in this area.[47] Arizona's mineral leasing practice should be sustained.

CONCLUSION

For the reasons stated, the decision of the Supreme Court of Arizona should be reversed.

Respectfully submitted,

DANIEL M. GRIBBON *
WILLIAM H. ALLEN
ELIZABETH V. FOOTE
DOUGLAS R. WILLIAMS
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

BURTON M. APKER
Apker, Apker & Kurtz, P.C.
Park One
2111 East Highland Avenue
Phoenix, Arizona 85016
(602) 381-0084

HOWARD A. TWITTY
Twitty, Sievwright & Mills
2702 North Third Street
Phoenix, Arizona 85004
(602) 248-9424

Attorneys for Petitioners

* Counsel of Record

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[47] Louisiana v. Garfield, 211 U.S. 70, 76 (1908); Iron Silver Mining Co. v. Elgin Mining & Smelting Co., 118 U.S. 196, 207 (1886); Lessees of Irwin H. Doolittle's Lessee v. Bryan, 55 U.S. (14 How.) 563, 566 (1853).

STATUTORY APPENDIX

STATUTORY APPENDIX

The Jones Act of 1927, as amended, ch. 57, Pub. L. No. 570, 44 Stat. 1026; ch. 151, Pub. L. No. 110, 47 Stat. 140 (1932); ch. 169, Pub. L. No. 340, 68 Stat. 57 (1954); ch. 572, Pub. L. No. 699, 70 Stat. 529 (1956); codified as amended at 43 U.S.C. §§ 870-71.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject to the provisions of subsections (a), (b), and (c) of this section, the several grants to the States of numbered sections in place for the support or in aid of common or public schools be, and they are hereby, extended to embrace numbered school sections mineral in character, unless land has been granted to and/or selected by and certified or approved, to any such State or States as indemnity or in lieu of any land so granted by numbered sections.

(a) That the grant of numbered mineral sections under this Act shall be of the same effect as prior grants for the numbered nonmineral sections, and titles to such numbered mineral sections shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections.

(b) That the additional grant made by this Act is upon the express condition that all sales, grants, deeds, or patents for any of the lands so granted shall hereafter be subject to and contain a reservation to the State of all the coal and other minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands not heretofore disposed of by the State shall be subject to lease by the State as the State legislature may direct, the proceeds and rentals and royalties therefrom to be utilized for the support or in aid of the common or public schools: *Provided*, That any lands or minerals hereafter disposed of contrary to

the provisions of this Act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court for the district in which the property or some part thereof is located.

(c) Except as provided in subsection (d), any lands included within the limits of existing reservations of or by the United States, or specifically reserved for water-power purposes, or included in any pending suit or proceeding in the courts of the United States, or subject to or included in any valid application, claim, or right initiated or held under any of the existing laws of the United States, unless or until such reservation, application, claim, or right is extinguished, relinquished, or canceled, and all lands in the Territory of Alaska, are excluded from the provisions of this Act.

(d) (1) Notwithstanding subsection (c), the fact that there is outstanding on any numbered school section, whether or not mineral in character, at the time of its survey a mineral lease or leases entered into by the United States, or an application therefor, shall not prevent the grant of such numbered school section to the State concerned as provided by this Act.

(2) Any such numbered school section which has been surveyed prior to the date of approval of this amendment, and which has not been granted to the State concerned solely by reason of the fact that there was outstanding on it at the time of the survey a mineral lease or leases entered into by the United States, or an application therefor, is hereby granted by the United States to such State under this section as if it had not been so leased; and the State shall succeed the position of the United States as lessor under such lease or leases.

(3) Any such numbered school section which is surveyed on or after the date of approval of this amendment and on which there is outstanding at the time of such survey a mineral lease or leases entered into by the

United States, shall (unless excluded from the provisions of this section by subsection (c) for a reason other than the existence of an outstanding lease) be granted to the State concerned immediately upon completion of such survey; and the State shall succeed to the position of the United States as lessor under such lease or leases.

(4) The Secretary of the Interior shall, upon application by a State, issue patents to the State for the lands granted by this Act, in accordance with the Act of June 12, 1934 (48 Stat. 1185, 43 U.S.C. 871a). Such patent shall, if the lease is then outstanding, include a statement that the State succeeded to the position of the United States as lessor at the time the title vested in the State.

(5) Where at the time rents, royalties, and bonuses accrue the lands or deposits covered by a single lease are owned in part by the State and in part by the United States, the rents, royalties, and bonuses shall be allocated between them in proportion to the acreage in said lease owned by each.

(6) As used in this subsection, "lease" includes "permit" and "lessor" includes "grantor."

SEC. 2. That nothing herein contained is intended or shall be held or construed to increase, diminish, or affect the rights of States under grants other than for the support of common or public schools by numbered school sections in place, and this Act shall not apply to indemnity or lieu selections or exchanges or the right hereafter to select indemnity for numbered school sections in place lost to the State under the provisions of this or other Acts, and all existing laws governing such grants and indemnity or lieu selections and exchanges are hereby continued in full force and effect.

New Mexico-Arizona Enabling Act of 1910, ch. 310, Pub. L. No. 219, § 24, 36 Stat. 557, 572.

That in addition to sections sixteen and thirty-six, heretofore reserved for the Territory of Arizona, sections

two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any parts thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any Act of Congress, or are wanting or fractional in quantity, or where settlement thereon with a view to preemption or homestead, or improvement thereof with a view to desert-land entry has been made heretofore or hereafter, and before the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes, and Acts amendatory thereof or supplementary thereto, are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein . . . .

New Mexico-Arizona Enabling Act of 1910, as amended, ch. 310, Pub. L. No. 219, § 28, 36 Stat. 557, 574-75; ch. 517, Pub. L. No. 658, 49 Stat. 1477 (1936); ch. 120, Pub. L. No. 44, 65 Stat. 51 (1951).

That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in

any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the State capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and homesite purposes, for a term of ten years or less; (2) the leasing of any of the said lands, in such manner as the Legislature of the State of Arizona may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas, and other hydrocarbon substances, for a term of twenty years or less; (3) the leasing of any of said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas, and other hydrocarbon substances on, in, or under said lands for an initial term of twenty years or less and as long thereafter as oil, gas, or other hydrocarbon substance may be procured

therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe, the terms and provisions to include a reservation of a royalty to said State of not less than 12½ per centum of production; or (4) the Legislature of the State of Arizona from providing by proper laws for the protection of lessees of said lands, whereby such lessees shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease or sale of said lands to other parties the former lessee shall be paid by the succeeding lessee or purchaser the value of such improvements and rights placed thereon by such lessee.

All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

No lands shall be sold for less than their appraised value, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: *Provided*, That said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in section twenty-four of this Act.

The State of Arizona is authorized to exchange any lands owned by it for other lands, public or private,

under such regulations as the legislature thereof may prescribe: *Provided*, That such exchanges involving public lands may be made only as authorized by Acts of Congress and regulations thereunder.

There is hereby reserved to the United States and excepted from the operation of any and all grants made or confirmed by this Act to said proposed State all land actually or prospectively valuable for the development of water powers or power for hydro-electric use or transmission and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State; and no lands so reserved and excepted shall be subject to any disposition whatsoever by said State, and any conveyance or transfer of such land by said State or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants there be, and is hereby, granted to the proposed State an equal quantity of land to be selected from land of the character named and in the manner prescribed in section twenty-four of this Act.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this Act conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed State, and shall at all time times be under a good and sufficient bond or bonds

conditioned for the faithful performance of his duties in regard thereto, as defined by this Act and the laws of the State not in conflict herewith.

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provision of the constitution or laws of the said State to the contrary notwithstanding.

It shall be the duty of the Attorney-General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act.

New Mexico-Arizona Enabling Act of 1910, ch. 310, Pub. L. No. 219, § 28, 36 Stat. 557, 574, third and fourth paragraphs.

* * * *

No mortgage or other incumbrance of the said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of tne transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of

like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves: *Provided*, That nothing herein contained shall prevent said proposed State from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.

All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

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New Mexico-Arizona Enabling Act of 1910, as amended by the Act of June 5, 1936, ch. 310, Pub. L. No. 219, § 28, 36 Stat. 557, 574, ch. 517, Pub. L. No. 658, 49 Stat. 1477, third and fourth paragraphs.

* * * *

No mortgage or other incumbrance of the said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portions thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than

ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered, nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves: *Provided*, That nothing herein contained shall prevent said State of Arizona from leasing in a manner as the State legislature may direct, any of said lands referred to in this section for grazing and agricultural purposes for a term of ten years or less, or from leasing any of said lands for mineral purposes (including leases for exploration of oil and gas and extraction thereof) for a term of twenty years or less.

All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

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Ariz. Rev. Stat. Ann. § 27-234(B) (1976 and Supp. 1987).

Every mineral lease of state land shall provide for payment to the state by the lessee of a royalty of five per cent of the net value of the minerals produced from the claim. The net value is deemed to be the gross value after processing, where processing is necessary for commercial use, less the actual cost of transportation from the place of production to the place of processing, less costs of processing and taxes levied and paid upon the production of the minerals. In case of minerals not processed for commercial use, the net value is the gross proceeds, or gross value, at the place of sale or use, less the

actual cost of transportation from the place of production to the place of sale or use, less taxes, if any, levied and paid upon the production of the minerals. The lease shall not require the payment of any royalty in advance of actual production of minerals from the claim.